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Kirk Albertson

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SPECIAL FEATURES

APPLYING TWENTY-FIVE YEARS OF EXPERIENCE: THE IOWA INDIAN CHILD WELFARE ACT

Kirk Albertson*

Let us put our minds together and see what kind of life we can build for our children.

— Sitting Bull, Hunkpapa Sioux¹

I. Introduction

On May 30, 2003, Iowa Governor Tom Vilsack signed into law the Iowa Indian Child Welfare Act.² The purpose of the Act is to supplement the Federal Indian Child Welfare Act of 1978 (ICWA),³ which provides minimum federal standards for child custody proceedings involving Indian children. This legislation was passed amid concerns about Iowa's implementation of ICWA and the state's child welfare system. The Iowa ICWA repeats much of the language of the Federal Act, but it also seeks to clarify provisions of the Federal ICWA as it applies to Iowa.⁴ The intent of the Act is primarily to

* J.D., 2005 (anticipated) from the University of Iowa College of Law. Mr. Albertson holds a B.S., 2001, from the University of Colorado and is an enrolled member of the Turtle Mountain Band of Chippewa Indians, Belcourt, North Dakota.

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1. B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 1, 8 (1995) ("Sitting Bull apparently made this statement upon his return from exile in Canada, when it was becoming apparent that the nomadic lifestyle of his Hunkpapa people was being proscribed by the white settlers.").

2. IOWA CODE §§ 232B.1-14 (2003).

3. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963 (2000)).

4. IOWA CODE § 232B.2 ("The purpose of the Iowa Indian [C]hild [W]elfare Act is to clarify state policies and procedures regarding implementation of the federal Indian Child Welfare Act. It is the policy of the state to cooperate fully with Indian tribes and tribal citizens

limit the ability of state court judges to avoid applying ICWA. However, the Iowa ICWA also includes provisions that redefine the application of ICWA and impose new requirements on courts and parties seeking placement. This article examines the history of the Iowa Indian Child Welfare Act, its provisions, and its affect on the application of the Federal ICWA.

The Indian Child Welfare Act was a controversial and groundbreaking piece of legislation when it was passed. It sought to strike a balance between state and tribal sovereignty and between the interests of Indian children and society at large. Recognizing that ICWA was by no means perfect, and drawing on twenty-five years of case law, Iowa sought to strengthen ICWA and fill in the gaps. In doing so, it has significantly raised the level of protection for Indian tribes and for Indian children and their parents. It has also raised questions about the ability of a state to redefine critical terms of ICWA. In the final analysis, the Iowa Indian Child Welfare Act is a landmark piece of legislation that provides greater protection to Indian tribes and families.

II. Background

The Indian Child Welfare Act of 1978⁵ was enacted to halt rampant state and private child welfare abuses that had resulted in a tremendous number of Indian children being removed from their homes.⁶ In the mid-1970s, congressional hearings revealed an alarming rate of Indian children being taken from their families and tribes “by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”⁷ Studies presented in the hearings showed that twenty-five to thirty-five percent of all Indian children had been removed from their families.⁸ Witness also testified to “the serious adjustment problems encountered by such children during adolescence.”⁹ Summing up the problem, one witness testified that, “[c]ulturally, the chances

in Iowa in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced.”).

5. 25 U.S.C. §§ 1901-1963.

6. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 601 (2002).

7. 25 U.S.C. § 1901(4).

8. *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 15 (1974) (statement of William Byler, Executive Director, Association of American Indian Affairs, Inc.).

9. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989).

of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.”¹⁰

The Indian Child Welfare Act sought to reverse this practice by making it the policy of the United States “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”¹¹ At the core of this protection is the grant of exclusive tribal jurisdiction in proceedings involving an Indian child domiciled on the reservation.¹² The Act also introduces a number of protections for Indian children and parents in child custody proceedings. These protections include: a right of intervention for Indian parents and tribes;¹³ the tribe’s right to notice of involuntary proceedings where the court has reason to know that an Indian child is involved;¹⁴ a requirement that states transfer proceedings to the child’s tribal court;¹⁵ and guidelines for placement of Indian children in foster and adoptive placements.¹⁶

Notwithstanding the policy of the Act, state courts often misinterpret ICWA, disagreeing about when it should be applied and what it requires. State courts have created exceptions to the applicability of ICWA, most notably the “existing Indian family” exception.¹⁷ They have also created their own definitions of terms contained in the Act, which further blunts the effectiveness of ICWA. State courts have taken great liberty with the “good cause” language in § 1915 to deviate from the stated placement preferences. For example, in *In re Juvenile Action No. 2-25525*,¹⁸ the court of appeals in

10. *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) (testimony of Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen’s Association).

11. 25 U.S.C. § 1902.

12. *Id.* § 1911(a).

13. Under *id.* § 1911(c), “the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point” in a state court proceeding for foster care placement or termination of parental rights.

14. *Id.* § 1912(a).

15. *Id.* § 1911(b). In cases where the Indian child does not live on the reservation, the state court is required to transfer the case to the tribal court, absent a showing of good cause.

16. *Id.* § 1915(a), (b).

17. The Kansas Supreme Court created this exception in *In re Adoption of Baby Boy L*, 643 P.2d 168 (Kan. 1982), where a non-Indian mother petitioned to terminate the parental rights of an Indian father. The court reasoned that ICWA was not applicable because the child had not been removed from an existing Indian family.

18. *In re Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983).

Arizona interpreted "good cause" to allow for a "best interests of the child" analysis. The court found good cause to deviate from the placement preferences because it was in the best interests of the child to remain with the adoptive mother, whom the baby girl had resided with for three years.¹⁹ State courts have also created their own interpretations of the "good cause" provision in § 1911 to deny removal of cases to tribal court.²⁰ Despite the inconsistent application of the Act, the U.S. Supreme Court has decided only one case involving ICWA. In *Mississippi Band of Choctaw Indians v. Holyfield*,²¹ the Court considered the adoption of twin babies, born off the reservation to unwed parents who were both enrolled members and domiciliaries of the Choctaw Reservation. The Mississippi Supreme Court found ICWA inapplicable since the twins never resided or were "domiciled" on the reservation.²² The court reversed, finding that Congress had not intended for state courts to define critical terms of ICWA.²³ Reasoning that the potential for inconsistent definitions was great, the court declared, "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile."²⁴

The *Holyfield* decision, however, has not prevented state courts from inconsistently interpreting and applying ICWA. As a result of the inconsistent application of the Act and the continuing high rates of Indian children being removed from their homes, tribes and lawmakers have argued for the need to amend ICWA.²⁵ At least fourteen bills to amend ICWA have been introduced in Congress.²⁶ Only one of the proposed amendments, however, have come

19. *Id.*

20. See *In re M.E.M.*, 725 P.2d 212 (Mont. 1986). The Montana Supreme Court used a "best interests" test to find good cause not to transfer the case to the tribe. The court rationalized that removing a child from his or her present living situation could be psychologically damaging.

21. 490 U.S. 30 (1989).

22. *Id.* at 39.

23. *Id.* at 44.

24. *Id.* at 45.

25. See generally Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419 (1998).

26. Indian Child Welfare Act Amendments of 1987, S. 976, 100th Cong. (1987); To amend the Indian Child Welfare Act of 1978 to require that determinations regarding status as an Indian child and as a member of an Indian tribe be prospective from the date of birth of the child and of tribal membership of the member, and for other purposes, H.R. 1448, 104th Cong. (1995); Indian Child Welfare Improvement Act of 1995, S. 764, 104th Cong. (1995); To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act, and for other purposes, H.R. 3156, 104th Cong. (1996); To amend the

to the floor for a vote, and ICWA has never been amended.²⁷ In the absence of federal direction, several states have enacted supplemental legislation to make the implementation of ICWA more effective.²⁸ These statutes have largely served to clarify state policies and procedures regarding implementation of the federal ICWA.²⁹ However, in addition to clarifying procedures, Minnesota has required heightened determination and notice requirements for voluntary placements.³⁰

Amid this backdrop, Iowa is an unlikely ICWA battleground. According to the 2000 U.S. Census, less than ten thousand of Iowa's 2.9 million residents are Native American. The Sac and Fox Reservation (known as the Mesquakie Indian Settlement) is the only federally recognized reservation in Iowa. Although it is not located near the Mesquakie Settlement, Woodbury County is home to the largest Indian population in the state.³¹ The largest city in Woodbury County, Sioux City, attracts residents from the nearby Winnebago and Omaha Indian reservations in Nebraska. It is here that the battle over ICWA rages. In 2003, the rate of Indian children placed in foster care in Woodbury County was seven times greater than the rate for white children.³² In the fall of 2003, more than 200 people marched from South Sioux City, Neb., across the bridge into Iowa to protest the abuses in the state's child welfare system.³³ Indeed, the Iowa child welfare system's problems run much

Indian Child Welfare Act to exempt from coverage of the act child custody proceedings involving a child whose parents do not maintain significant social, cultural, or political affiliation with the tribe of which the parents are members, and for other purposes, H.R. 3275, 104th Cong. (1996); Indian Child Welfare Act Amendments of 1996, H.R. 3828, S. 1962, 104th Cong. (1996); Indian Child Welfare Act Amendments of 1997, H.R. 1082, S. 569, 105th Cong. (1997); To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act, and for other purposes, H.R. 1957, 105th Cong. (1997); Indian Child Welfare Act Amendments of 1999, S. 1213, 106th Cong. (1999); Indian Child Welfare Act Amendments of 2001, H.R. 2644, 107th Cong. (2001); Indian Child Welfare Act Amendments of 2002, H.R. 4733, 107th Cong. (2002); Indian Child Welfare Act Amendments of 2003, H.R. 2750, 108th Cong. (2003).

27. Indian Child Welfare Act Amendments of 1996, S. 1962, 104th Cong. (1996). The bill was introduced in the Senate by Sen. John McCain, R.-Ariz., and passed by unanimous consent on September 26, 1996. 142 CONG. REC. S11458 (1996).

28. See, for example, Nebraska Indian Child Welfare Act, NEB. REV. STAT. §§ 43-1501 to 43-1516 (2003); Oklahoma Indian Child Welfare Act, 10 OKLA. STAT. §§ 40-40.9 (2001).

29. See NEB. REV. STAT. §§ 43-1502 (2003); 10 OKLA. STAT. § 40.1 (2001).

30. See Minnesota Indian Family Preservation Act, MINN. STAT. § 260.751-.835 (1999).

31. Jennifer Dukes Lee, *American Indians: "We Have Had Enough,"* DES MOINES REGISTER, Nov. 27, 2003, at 1B.

32. *Id.*

33. *Id.*

deeper than its handling of placement of Indian children. Beset by budget shortfalls and ineffective foster-care system, Iowa has resorted to massive budget cuts and restructuring to handle the crisis.³⁴ While the debate over how to provide cheaper, family-friendly foster care continued, the state quietly enacted the Iowa Indian Child Welfare Act.

III. The Iowa Indian Child Welfare Act

A. The Statute

The Iowa Indian Child Welfare Act³⁵ is similar to statutes passed by other states in the heightened standard of protection it provides and the clarifications it includes. It provides a universal presumption of tribal jurisdiction,³⁶ more stringent notice requirements,³⁷ and stricter definitions of several terms. The Act seeks to make the application of ICWA as broad as possible and to provide maximum protection to Indian parents and tribes. However, the Act also includes provisions substantively different from ICWA, which call into question whether Iowa has made the interests of the tribe the primary consideration in child protection proceedings.

B. Definitions

While much of the Iowa ICWA repeats the language of the federal ICWA, it modifies several definitions from the Federal Act. First, under the federal ICWA, an Indian is “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation.”³⁸ Iowa’s definition, in addition to the federal definition, includes a person who is “eligible for membership in an Indian tribe.”³⁹ Second, the federal ICWA defines an “Indian child” to be “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an

34. Lee Rood, *Iowa's Reform of Child Welfare*, DES MOINES REGISTER, June 10, 2003, at 1A.

35. IOWA CODE §§ 232B.1-14 (2003).

36. *Id.* § 232B.5(10) (“Unless either of an Indian child’s parents objects, in any child custody proceeding involving an Indian child who is not domiciled or residing within the jurisdiction of the Indian child’s tribe, the court shall transfer the proceeding to the jurisdiction of the Indian child’s tribe [upon petition].”).

37. *See id.* § 232B.5(4), (8) (requiring notice for voluntary as well as involuntary proceedings).

38. 25 U.S.C. § 1903(3) (2000).

39. IOWA CODE § 232B.3(5).

Indian tribe.”⁴⁰ Iowa, however, employing a more inclusive and ambiguous definition, defines an “Indian child” to be “an unmarried Indian person who is under eighteen years of age or a child who is under eighteen of age that an Indian tribe identifies as a child of the tribe’s community.”⁴¹ Third, the Iowa Act provides a broader definition of “extended family member” than does the Federal Act. While both statutes include siblings, grandparents, aunts, uncles, and cousins as members of the extended family, the Iowa definition also includes “clan members” and “band members.”⁴² This becomes an important difference as both statutes list family members as the primary placement preference in both adoptive and foster care placements.⁴³

C. Determining Indian Status and Notice Requirements

Iowa ICWA also imposes additional burdens on the court and parties to the case to ensure Indian children are identified early in the proceeding. While the federal ICWA is unclear about determining when an Indian child is involved, the Iowa Act provides specific requirements for determination and requires that the determination “be made as soon as practicable in order to serve the best interest of the child and to ensure compliance with the notice requirements of this chapter.”⁴⁴ First, the Iowa Act requires the party initiating the proceeding to determine whether the child is an Indian child.⁴⁵ The Act provides that:

The court shall require a party seeking the foster care placement of, termination of parental rights over, or the adoption of, an Indian child to seek to determine whether the child is an Indian child through contact with an Indian tribe in which the child may be a member or eligible for membership, the child’s parent, any person who has custody of the child or with whom the child resides, and any other person that reasonably can be expected to have information regarding the child’s possible membership or eligibility for membership in an Indian tribe, including but not limited to the United States Department of the Interior.⁴⁶

40. 25 U.S.C. § 1903(4).

41. IOWA CODE § 232B.3(6).

42. 25 U.S.C. § 1903(2); IOWA CODE § 232B.3(7).

43. 25 U.S.C. § 1915(a)(1), (b)(1); IOWA CODE § 232B.9(1)(a), (2)(a).

44. IOWA CODE § 232B.4(4).

45. *Id.* § 232B.4(2).

46. *Id.*

Second, Iowa ICWA contains several instances to indicate when a court or party to a proceeding shall be deemed to know or have reason to know that an Indian child is involved: 1) the court or a party to the proceeding has been informed that the child is or may be an Indian child; 2) the subject child gives the court reason to believe (s)he is an Indian child; or 3) the court or a party to the proceeding has reason to believe the residence/domicile of the child is in a predominantly Indian community.⁴⁷ This provision is particularly important as it pertains to the federal notice requirement “where the court knows or has reason to know that an Indian child is involved.”⁴⁸

Third, Iowa ICWA imposes a broader notice requirement than the minimum standards of the federal ICWA. While both the federal ICWA and Iowa ICWA require notice to the child’s parents, Indian custodian, and tribe for involuntary foster care placement, or termination proceedings, the Iowa ICWA also requires notice to all of these parties for any *voluntary* proceedings.⁴⁹ Furthermore, while the federal ICWA only requires notice “of the pending proceedings and of their right of intervention,”⁵⁰ the Iowa ICWA includes numerous items that must be included in the notice “in clear and understandable language.”⁵¹ These include: (a) “The name and tribal affiliation of the Indian child, (b) A copy of the petition by which the proceeding was initiated, and (c) A statement listing the rights of the child’s parents, Indian custodians, and tribes and, if applicable, the rights of the Indian child’s family.”⁵²

D. Jurisdiction and Intervention

Iowa ICWA also contains substantive differences in its jurisdictional and permissive intervention provisions. Both the federal ICWA and the Iowa ICWA allow for circumstances of exclusive tribal jurisdiction and concurrent state-tribal jurisdiction. Under both statutes, exclusive tribal jurisdiction is limited to proceedings involving a child residing on the reservation.⁵³ Concurrent jurisdiction is provided for by the removal provisions of each

47. *Id.* § 232B.5(3).

48. 25 U.S.C. § 1912(a).

49. *Id.* ; IOWA CODE § 232B.5(4), (8). The Iowa Code also broadens the tribal notice requirement to include “any tribe in which the child may be a member or eligible for membership.”

50. 25 U.S.C. § 1912(a).

51. IOWA CODE § 232B.5(7).

52. *Id.*

53. 25 U.S.C. § 1911(a); IOWA CODE § 232B.5(1).

statute, which require removal absent a showing of “good cause.”⁵⁴ However, while the federal ICWA limits concurrent jurisdiction to foster care placements and termination of parental rights, Iowa ICWA grants concurrent jurisdiction for *any* custody proceeding, which includes adoption proceedings as well as foster care placements and termination of parental rights.⁵⁵ Iowa ICWA includes a similar provision with regard to intervention. While federal ICWA only allows for tribal intervention in foster care placements and termination of parental rights,⁵⁶ Iowa ICWA also allows tribes to intervene in adoption proceedings.⁵⁷

In addition, Iowa ICWA also strictly limits what constitutes “good cause” for state courts to decline to transfer proceedings to tribal courts. While the federal ICWA provides no definition of “good cause,” the Bureau of Indian Affairs has provided guidelines for determining when good cause exists. These include the following circumstances: (1) the proceeding was at an advanced stage when the petition for transfer was received and the tribe did not file promptly after receiving notice, (2) transfer would cause undue hardship to the parties or witnesses, and (3) the parents of the child are unavailable and the child has little or no tribal contact.⁵⁸ Under Iowa ICWA, however, a court may find good cause to deny transfer only in the following circumstances: (1) the tribal court declines the transfer, (2) the tribal court does not have subject matter jurisdiction, or (3) transfer would cause undue hardship to the parties or the witnesses.⁵⁹ Furthermore, Iowa ICWA dictates that any objection to transfer to tribal court should be rejected, as it would “prevent maintaining the vital relationship between Indian tribes and the tribes’ children and would interfere with the policy that the best interest of an Indian child require that the child be placed in a foster or adoptive home that

54. Under 25 U.S.C. § 1911(b) (2000), the state court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

Id.

55. *Id.*; IOWA CODE § 232B.5(10).

56. 25 U.S.C. § 1911(c).

57. IOWA CODE § 232B.5(14).

58. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,591 (1979). While most states have followed the guidelines, they have used varying interpretations.

59. IOWA CODE § 232B.5(13).

reflects the unique values of Indian culture.”⁶⁰

E. Placement

Iowa ICWA also includes several new procedural requirements for state courts in custody proceedings involving Indian children. First, the Act requires any person or court involved in a custody proceeding to use the services of the child's tribe in seeking to secure placement.⁶¹ Second, while both statutes require parties seeking involuntary foster care placement or termination of parental rights to provide evidence of “active efforts” at remediation and rehabilitation that proved unsuccessful, Iowa ICWA substantially limits the definition of “active efforts.” Evidence of active efforts must demonstrate “a vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts. . . . Reasonable efforts shall not be construed to be active efforts.”⁶²

Iowa ICWA also contains several provisions with regard to placement preferences that differ from the Federal Act. First, while both the federal and Iowa Acts provide a list of placement preferences, Iowa ICWA does not allow the court to deviate from the stated preference for “good cause.” Under 25 U.S.C. § 1915(a) and (b), in any adoptive, foster care, or adoptive placement, “a preference shall be given, *in the absence of good cause to the contrary*,” to the stated preferences. Iowa ICWA omits this possibility.⁶³ The Iowa Act also includes a pair of additions to the placement preferences for adoptive or permanent placement: a non-Indian family approved by the Indian child's tribe, and a non-Indian family committed to enabling extended family visitation and participation in cultural and ceremonial events of the child's tribe.⁶⁴ The Act includes similar additions for foster care or preadoptive placement.⁶⁵

IV. Analysis

Article III, Section 8 of the United States Constitution grants to Congress the authority to “To regulate Commerce . . . with Indian Tribes.”⁶⁶ The Indian Child Welfare Act further states that “through this and other constitutional

60. *Id.* § 232B.5(11).

61. *Id.* § 232B.5(18).

62. 25 U.S.C. § 1912(d) (2000); IOWA CODE 232B.5(19).

63. IOWA CODE § 232B.9(1), (2).

64. *Id.* § 232B.9(1)(d), (e).

65. *Id.* § 232B.9(2)(d), (e).

66. U.S. CONST. art. I, § 8, cl. 3.

authority, Congress has plenary power over Indian affairs.”⁶⁷ This declaration of the full power of Congress to regulate Indian affairs raises the question of whether, and to what degree, Congress preempted state law in the area of ICWA. By its own language, ICWA “did not preempt the entire field of family law relating to Indian children.”⁶⁸ Rather, it established “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” to ensure respect for Indian culture and families.⁶⁹ States remain free to enact legislation that “provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA].”⁷⁰ Noticeably absent from § 1921 is language allowing states to provide a higher standard of protection for Indian *tribes*. While much of the Iowa ICWA provides greater protection for parents and children, several provisions appear to provide greater protection to the tribe only. Thus, these provisions may arguably be preempted by the federal ICWA.

A. Broader Application

The requirements of Iowa ICWA operate to maximize the protection provided for Indian children and families under the federal ICWA. It also drastically curtails the ability of state courts to avoid application of the Act or its various obligations. As previously discussed, Iowa ICWA’s definitions of “Indian” and “Indian child” are more inclusive than the federal act to ensure that Indian child custody proceedings are adjudicated under ICWA. This prevents courts from making their own determinations as to whether a child is “Indian” within the meaning of ICWA. By leaving to the tribe to determine who is a “child of the tribe’s community,” the Act recognizes that the tribe is “the ultimate authority on eligibility for tribal membership.”⁷¹ However, the broader definition may include children that Congress never intended to be subject to ICWA. Under the Iowa Act, a child may be subject to ICWA even if neither the child nor their parents is a member of an Indian tribe. At least one court has held that the federal ICWA definition of “Indian child” was the only valid definition. In *State ex rel. State Office for Services to Children and Families v. Klamath Tribe*,⁷² the Oregon Court of Appeals invalidated an

67. 25 U.S.C. § 1901(1).

68. *In re Adoption of T.N.F.*, 781 P.2d 973, 979 (Alaska 1989).

69. 25 U.S.C. § 1902.

70. *Id.* § 1921.

71. *In re Adoption of Riffle*, 902 P.2d 542, 545 (Mont. 1995).

72. *State ex rel. Office for Servs. to Children & Families v. Klamath Tribe*, 11 P.3d 701

agreement between the state Department of Services to Children and Indian tribes in the state to extend the definition of "Indian child" beyond that found in ICWA. The court held that for purposes of ICWA only Congress could define who is an "Indian child."⁷³ However, Klamath Tribe involved not a state law, but an agreement between the state and the tribe. Iowa ICWA is not an agreement, but a state law providing greater protection than the minimum standards established by the federal ICWA.

Iowa ICWA also seeks to provide a higher standard of protection through its determination requirements. While ICWA governs Indian child custody proceedings, it imposes no requirements on either the courts or the parties to the proceeding to determine whether a child is an Indian child. If a court does not "have reason to know that an Indian child is involved,"⁷⁴ it has no notice obligation and ICWA doesn't apply. Iowa ICWA imposes a requirement that the initiating party take steps to determine whether the child is a tribal member or eligible for membership.⁷⁵ This includes contacting the child's parents, custodian, or "any other person that reasonably can be expected to have information regarding the child's possible membership or eligibility for membership in an Indian tribe, including but not limited to the United States [D]epartment of the [I]nterior."⁷⁶ Further, Iowa ICWA provides circumstances where a court will be "deemed to know or have reason to know that an Indian child is involved."⁷⁷ These include: (1) where the court has been informed, (2) where the child "gives the court reason to believe the child is an Indian child," and (3) the court has reason to believe the child lives in an Indian community.⁷⁸

B. Notice Requirements

The effect of the determination requirements is to virtually guarantee the court will [have] "reason to know that an Indian child is involved."⁷⁹ This, in turn, triggers the notice requirement of the federal ICWA, which is important because "the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is

(Or. Ct. App. 2000).

73. *Id.* at 707.

74. 25 U.S.C. § 1912(a).

75. IOWA CODE § 232B.4(2) (2003).

76. *Id.*

77. *Id.* § 232B.5(3).

78. *Id.*

79. 25 U.S.C. § 1912(a).

pending.”⁸⁰ Additionally, because some courts have held strict compliance with the notice requirements of the federal ICWA is not necessary,⁸¹ Iowa ICWA imposes a series of requirements for giving notice. These requirements include a list of the rights of the child’s parents, custodian and tribe.⁸²

While the federal ICWA imposes notice requirements for involuntary proceedings, it is silent with regard to notice for voluntary proceedings.⁸³ Iowa ICWA, on the other hand, requires notice for all custody proceedings, voluntary or involuntary. The federal ICWA’s silence on this issue raises the question of whether Iowa can impose these additional requirements. In *Catholic Social Services Inc. v. C.A.A.*,⁸⁴ the Alaska Supreme Court held that strict compliance with ICWA prohibited notice to the tribe of a proceeding for a voluntary termination of parental rights.⁸⁵ However, this interpretation of 25 U.S.C. § 1912(a) necessarily limits the right of the tribe to intervene “in any state court proceeding” under 25 U.S.C. § 1911(c), suggesting notice is permissive but not required in voluntary proceedings. Additionally, unlike the Alaska case, Iowa ICWA provides a *statutory* basis for giving notice to the tribe.

C. The Existing Indian Family Exception

An important effect of Iowa ICWA is the elimination of the controversial “existing Indian family” exception. This exception was created by the Kansas Supreme Court in the case *In re Baby Boy L.*⁸⁶ finding the Act did not apply to “an illegitimate infant who has never been a member of an Indian home or culture, . . . [and] so long as the mother is alive to object, would probably

80. *In re Junious M.*, 193 Cal Rptr. 40, 42 (Cal. Ct. App. 1983).

81. *See, e.g., In re M.S.S.*, 936 P.2d 36, 40 (Wash. Ct. App. 1997) (“[T]echnical compliance with the act is not required if there has been substantial compliance with the notice provisions of the ICWA.”).

82. Section 232B.5(7)(c) of the Iowa Code requires notice to include a statement of rights including:

(1) the right to intervene in the proceeding, (2) the right to petition the court to transfer the proceeding to the tribal court of the Indian child’s tribe, (3) the right to be granted up to an additional twenty days from the receipt of the notice to prepare for the proceeding, (4) The right to request that the court grant further extensions of time, and (5) In the case of an extended family member, the right to intervene and be considered as a preferred placement for the child.

IOWA CODE 232B.5(7)(c).

83. 25 U.S.C. § 1912(a).

84. 783 P.2d 1159 (Alaska 1989).

85. *Id.*

86. 643 P.2d 168 (Kan. 1982).

never become a part of the [father's] or any other Indian family."⁸⁷ Several state courts, interpreting the intent of ICWA, have held the Act does not apply when a child is not being removed from an Indian family or an Indian cultural setting.⁸⁸ The Supreme Court indirectly confronted the exception in *Mississippi Band of Choctaw Indians v. Holyfield*,⁸⁹ the Court's only decision on the application of ICWA. There, the Court determined Congress did not intend for state courts to be able to define key terms of the Act.⁹⁰ The Supreme Court also declared the interests of the parents were not the controlling factor, stating:

Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian Children adopted by non-Indians.⁹¹

Although this language suggests a broader application of ICWA, the effect of *Holyfield* on the existing Indian family exception is unclear. The South Dakota Supreme Court has determined *Holyfield* expressly repudiated the exception.⁹² However, several courts have declared that the existing Indian family exception comports with ICWA, despite the *Holyfield* decision.⁹³ The Washington Supreme Court has even suggested *Holyfield* supports the existing Indian family exception.⁹⁴

While courts have struggled to determine the applicability of the existing Indian family exception, Iowa ICWA flatly rejects the exception. The revised definition of "Indian child" operates to take the determination of whether a child is Indian out of the court's hands and vests it solely with the tribe.⁹⁵ If

87. *Id.* at 175.

88. *See, e.g.,* Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987); *In re Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

89. 490 U.S. 30 (1989).

90. *Id.* at 49.

91. *Id.*

92. *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).

93. *See, e.g.,* Rye v. Weasel, 934 S.W. 2d 257, 263 (Ky. 1996) ("*Holyfield* addressed questions of domicile and did not consider the Existing Indian Family Doctrine. Thus, *Holyfield* does not prevent the application of the doctrine here.").

94. *In re Crews*, 825 P.2d 305, 310 (Wash. 1992) ("*Holyfield* supports our conviction that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation.").

95. *See* IOWA CODE § 232B.3(6) (2003).

this implication is insufficient, the Act also expressly repudiates the exception and makes ICWA universally applicable to proceedings involving an Indian child. Under section 232B.5(1) of the Iowa Code, “A state court does not have discretion to determine the applicability of the federal Indian Child Welfare Act or this chapter to a child custody proceeding based on whether an Indian child is part of an existing Indian family.”⁹⁶

D. “Good Cause” and Tribal Jurisdiction

The Act’s limitations on the “good cause” sections of ICWA drastically limit a state court’s ability to refuse to transfer proceedings. Under the federal ICWA, state courts must transfer custody proceedings to tribal court absent objection by either parent or “good cause to the contrary.”⁹⁷ However, even following the BIA Guidelines, state courts have inconsistently interpreted the “good cause” requirement. One state court found the timeliness requirement was not satisfied when there was a five-month delay by the tribe between receiving notice and petitioning for transfer.⁹⁸ However, another court determined a tribe’s petition was timely despite a year delay between notice and petition.⁹⁹ Presumably because of the heightened notice requirements of Iowa ICWA, the Act does not include lack of timeliness as good cause not to transfer. Although this may place a court in a difficult position of having to transfer very late in the proceeding, the additional notice requirements should make such instances rare.¹⁰⁰

The ability of the court to deny transfer due to “undue hardship” is often used to deny transfer when the parents do not live on the reservation.¹⁰¹ However, use of this doctrine severely undermines the “concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation,” created by § 1911(b) of the federal ICWA.¹⁰² As a result, Iowa

96. *Id.* § 232B.5(1).

97. 25 U.S.C. § 1911(b) (2000).

98. *In re Robert T.*, 246 Cal. Rptr. 168, 172 (Cal. Ct. App. 1988).

99. *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994).

100. Under subsections 232B.4(2) and (4) of the Iowa Code, the party initiating the proceeding is required to determine whether the child is an Indian child as soon as practicable. IOWA CODE § 232B.4(2), (4). Under section 232B.5(4), the party initiating the proceeding must give notice to the child’s parents, Indian custodians, and any tribe which the child may belong to. *Id.* § 232B.5(4).

101. See, for example, *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. Ct. App. 1995), where the Texas Court of Appeals denied transfer to an Arizona tribal court because of the “undue hardship to parties and witnesses” that would result.

102. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

ICWA imposes the additional requirement that the tribal court must be unable to mitigate the hardship through remote communication or other means before a finding of good cause not to transfer is proper.¹⁰³

Another widely invoked basis for finding good cause is that transfer is not in the child's best interests. Although this ground is not included in the BIA guidelines, courts relying on it have cited the congressional intent of ICWA to "protect the best interests of Indian children."¹⁰⁴ In *In re M.E.M.*,¹⁰⁵ the Montana Supreme Court found the BIA guidelines were not exclusive and that the best interests of the child were sufficient to establish good cause not to transfer.¹⁰⁶ Iowa ICWA specifically addresses the best interests test by stating that objections to tribal jurisdiction should be rejected when they "interfere with the policy that the best interest of an Indian child requires that the child be placed in a foster or adoptive home that reflects the unique values of Indian culture."¹⁰⁷ Thus, Iowa ICWA removes the best interest question by effectively making the child's best interests coincide with the tribe's best interests. Indeed, the very limited definition of "good cause" contained in Iowa ICWA, essentially restricts a finding of good cause to circumstances where the tribal court is unable to accept jurisdiction. In this way, the state court has virtually no discretion to find good cause not to transfer.

E. "Good Cause" and Placement Preferences

State courts must also follow the placement preferences outlined in ICWA absent a showing of good cause.¹⁰⁸ While the Act itself does not define "good cause," the BIA guidelines include the following considerations: (1) the request of the biological parents or the Indian child if of a sufficient age, (2) the extraordinary physical or emotional needs of the child, as established by a qualified expert, or (3) the unavailability of suitable families for placement after a diligent search has been completed.¹⁰⁹ State courts most often find good cause to deviate from the Act's placement preferences because they apply a best interests test, "and then make an Anglo determination of the

103. IOWA CODE § 232B.5(13)(c).

104. 25 U.S.C. § 1902 (2000).

105. 635 P.2d 1313 (Mont. 1981).

106. *Id.*

107. IOWA CODE § 232B.5(11) (2003).

108. 25 U.S.C. § 1915(a), (b) (2000).

109. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,594 (1979).

Indian child's best interests."¹¹⁰ In *In re Adoption of F.H.*,¹¹¹ the Alaska Supreme Court used the best interests test to find good cause to place the child with non-Indian parents because the adopted mother had bonded with the child.¹¹²

Iowa ICWA employs a number of tactics to eliminate deviation from the placement preferences for good cause. Most noticeably, the Act simply eliminates the right of the court to deviate from the placement preferences.¹¹³ The Act also includes "non-Indian families" as an additional placement preference that does not appear in the Federal ICWA.¹¹⁴ These sections work to ensure that, while the best interests of the child will be considered in placing the child, they will not allow the court to opt out of the placement preferences. To ensure state courts do not create a best interests exception to the placement, Iowa ICWA also states that placement according to the preferences is in the best interests of the child.¹¹⁵ Finally, Iowa ICWA imposes a requirement that an expert witness testify that placement is in the child's best interests.¹¹⁶

F. Section 1921 Analysis

While Iowa ICWA adheres to the stated policy of the federal ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,"¹¹⁷ it raises some potential conflicts with another section of the Act. Under 25 U.S.C. § 1921, courts may apply state law in a proceeding where the state law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under" ICWA.¹¹⁸ While the meaning of this section is unclear, at least one court has interpreted it to mean that *only* state laws that

110. Metteer, *supra* note 25, at 444.

111. 851 P.2d 1361 (Alaska 1993).

112. *Id.* at 1363.

113. Section 232B.9(1) of the Iowa Code provides that "[i]n any adoptive or other permanent placement of an Indian child, preference shall be given to a placement with one of the following" IOWA CODE § 232B.9(1) (2003). Section 232B.9(2) contains the same specification with regard to emergency removal, foster care, or preadoptive placement.

114. *Id.* §§ 232B.9(1)(d), (e), 232B.9(2)(d), (e).

115. Under section 232B.9(3) of the Iowa Code, "To the greatest extent possible, a placement made in accordance with subsection 1 or 2 shall be made in the best interest of the child." *Id.* § 232B.9(3).

116. *Id.* § 232B.9(4).

117. 25 U.S.C. § 1902 (2000).

118. *Id.* § 1921.

provide a higher standard of protection for parents are applicable in ICWA proceedings. In *In re Adoption of M.T.S.*,¹¹⁹ the court invalidated Minnesota's "best interest of the child" test for placement, reasoning that, because the statute "did not provide a higher standard of protection to the rights of the parent or Indian custodian, it is preempted by the ICWA."¹²⁰ While the Iowa ICWA eliminates any ability to depart from the placement preferences in the best interests of the child, several provisions appear to value the rights of the tribe over those of the parent.

Most noticeable is the Iowa ICWA's requirement of notice to the tribe for voluntary proceedings.¹²¹ While under the federal ICWA parents may voluntarily terminate parental rights and place their child up for adoption in state court, Iowa ICWA requires the tribe to be involved in the process. This suggests a higher standard of protection for the rights of the tribe than for the rights of the parents. A similar consideration exists with regard to placement preferences. Iowa ICWA broadens the definition of "family member"¹²² and includes in its placement preferences a "non-Indian family approved by the Indian child's tribe."¹²³ The Iowa Act's expert testimony requirement provides an even greater measure of protection to tribes. First, the Act requires a "qualified expert witness" to testify "regarding whether the tribe's culture, customs, and laws would support the placement of the child in foster care or the termination of parental rights."¹²⁴ The Act also requires a determination by the expert "that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."¹²⁵ While this requirement is designed to protect the parents from arbitrary determinations of the state child welfare system, it also gives great power to the tribe, of which the expert is likely to be a member.¹²⁶ These provisions operate to all but assure the tribe will have the final say on placement, including a voluntary adoption. While the Federal Act provides minimum standards, these sections of Iowa ICWA appear to provide far more

119. 489 N.W.2d 285 (Minn. Ct. App. 1992).

120. *Id.* at 288. The relevant portion of the statute involved allowed the court to consider the fact that separation from the child's current foster home would be initially painful to the child. The court found that the child's presumed interest weighed more heavily than the wishes of the parents to violate 25 U.S.C. § 1921.

121. IOWA CODE § 232B.5(8).

122. *Id.* § 232B.3(7)(f), (g).

123. *Id.* § 232B.9(1)(d).

124. *Id.* § 232B.10(2).

125. *Id.*

126. *Id.* § 232B.10(3).

protections for tribes than for parents. Indeed, these provisions of Iowa ICWA would arguably be preempted by the Federal Act, if not for the ability of the parents to object to transfer.¹²⁷ The right of the parents to object to transfer the proceedings to tribal court helps to ensure that the tribe's interests will not outweigh the parents' interests.

G. Holyfield Analysis

Iowa ICWA also raises questions with regard to the *Holyfield* decision. In that case, the Supreme Court rested its decision on the principle that "[i]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependant on state law."¹²⁸ In holding that state courts were not free to apply their own definitions of "domicile," the Supreme Court employed two reasons. "First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term."¹²⁹ Second, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile."¹³⁰

Indeed, if *Holyfield* stands for anything, it is the prospect that Congress intended for a uniform application of ICWA.¹³¹ However, the framework created by the Iowa Act will operate differently, in some instances very differently, from other states. Iowa's broader definitions and notice requirements are the most striking examples of this. For example, in Iowa, an Indian couple living off the reservation that puts their child up for adoption will be required to provide notice to the tribe and be subject to the tribe's right to intervene.¹³² Further, the tribe may become involved even if neither parent is an enrolled tribal member.¹³³ This is a stark contrast to parents living in another state being able to place their child up for adoption freely. Such a disparity seems to directly counter the principle of uniformity adopted articulated in *Holyfield*. Furthermore, while the definitions adopted by Iowa ICWA serve to provide greater protection to Indian tribes, children and

127. *Id.* § 232B.5(10) ("Unless either of an Indian child's parents objects, in any child custody proceeding involving an Indian child who is not domiciled or residing within the jurisdiction of the Indian child's tribe, the court shall transfer the proceeding to the jurisdiction of the Indian child's tribe . . .").

128. *NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600, 603 (1971).

129. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989).

130. *Id.* at 45.

131. *Id.* at 47.

132. *See* IOWA CODE § 232B.5(8); *id.* § 232B.5(14).

133. *See id.* § 232B.3(5), (6).

parents, they also serve to significantly alter the operation of the Federal Act. The elimination of the good cause to deviate from placement preferences and the severe curtailment of the good cause to deny transfer changes two arguably critical terms of the Federal Act.

Perhaps, however, *Holyfield* is not the solid precedent that it appears to be. Indeed, while state courts have freely interpreted every provision of the Act, the Supreme Court has not taken up any more cases involving ICWA. It is obviously not true that every term in ICWA is a "critical" term. More likely, critical terms are limited to those that may determine whether ICWA applies to a given case or not. While the definitions of "Indian" and "Indian child" may be such terms, "good cause" is probably not. Additionally, why Congress may have intended a uniform interpretation, it clearly recognized that ICWA would be interpreted, almost exclusively, by state courts. Hence, where Congress had intended to define critical terms, it seems to have done so for the most part, and left the other interpretations to the state courts.

H. Policy Considerations

Putting aside any questions about Iowa's authority to pass such a statute, Iowa ICWA is a bold step towards effective implementation of federal law. It eliminates many judge-made doctrines that operate to limit the scope and effectiveness of ICWA. It clarifies many of the provisions contained in the Federal Act and provides effective guidelines for interpretation of ICWA. In doing so, Iowa ICWA recognizes "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."¹³⁴

V. Conclusion

If Congress were to enact legislation similar to the Iowa ICWA, it would likely be hailed by states and Indian tribes alike. The Act has been cited as model legislation among Indian tribes.¹³⁵ Iowa ICWA is very effective in

134. 25 U.S.C. § 1901(5) (2000).

135. *Indian Child Welfare Act Seen as Model*, DES MOINES REGISTER, Apr. 24, 2003, at <http://desmoinesregister.com/news/stories/c4780934/21086609.html> (last visited Oct. 15, 2004) ("Sen. Steve Warnstadt, D-Sioux City, said tribes nationally have expressed interest in using Iowa's Indian Child Welfare Act as a model. The measure, aimed at preserving Indian families and culture, is believed to be among the strongest of its kind in the nation."). In 2004, a bill that was virtually identical to Iowa ICWA was introduced in the South Dakota Legislature. S.B.

clarifying the federal ICWA and identifying and eliminating judge-made exceptions to the federal ICWA. It provides maximum protection to the rights of tribes and makes clear that placement in accordance with its provisions is in the best interests of the child. However, the fact that this legislation was passed subjects it to increased scrutiny because it adds so much to the Federal Act. It broadens the application of ICWA while simultaneously limiting the exceptions. The end result is that the Act may be applied very differently in Iowa than it is in other states. Finally, the real problem with the ICWA has always been the unwillingness of state courts to enforce it. The march in Sioux City that took place in November 2003 happened after Iowa ICWA was passed, and it happened over concerns that neither the Federal Act nor the Iowa Act was being enforced.¹³⁶ There would have been no need for Iowa to pass its own law if judges were willing to follow the federal ICWA faithfully. While questions might be raised about Iowa's ability to pass such a law, it cannot be denied that Iowa has acted in good faith to protect the rights of its Indian community as well as its Indian families.

211, 79th Leg. (S.D. 2004). The bill was amended, however, and, as enacted, it served only to establish a commission to study compliance with ICWA.

136. See Rood, *supra* note 34.

